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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1961

No. 888

[redacted]
and
[redacted]
Petitioners,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Petition for Certiorari to the Supreme Court of the State of Michigan

BRIEF OPPOSING PETITION FOR CERTIORARI

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KINSEY-HOWES AND THOMAS, INC., STATE PRINTERS, LANSING, MICH., 1962

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1961

No. 593

FRED BERNARD DEGILLIO AND
MILTON SILVERMAN
Petitioners,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On application for Certiorari to the Supreme Court of the State of Michigan

BRIEF OPPOSING PETITION FOR CERTIORARI

I

OPINIONS OF COURTS BELOW

Respondents adopt petitioners Appendix and add Appendix B. Unless otherwise indicated, numbers in parentheses throughout this response refer to pages of our joint appendix, found in petitioners' brief and Appendix B of respondent's brief.

Attached to the joint appendix are two orders of the Michigan Supreme Court. In the order dated August 8,

1961, the Court denied petitioners application for leave to Appeal. Also included is the order dated September 21, 1961, in which the Court denied a petition for rehearing.

II

COUNTER-STATEMENT ON JURISDICTION

It is our position that the petition for certiorari presents no substantial Federal questions, and that such questions as are raised therein are frivolous.

III

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Do petitioners have a constitutional right to counsel during a preliminary interrogation?

2. Were petitioners denied due process of law under the Fourteenth Amendment by the Trial Judge's refusal to grant a continuance?

3. Were petitioners denied a fair trial by the admission into evidence of statements made during a preliminary interrogation?

4. Were petitioners informed of the nature and cause of the accusation?

IV

COUNTER-STATEMENT OF FACTS

Mark and Gabrieline Lavrack were purchasing a home

located at 6159 Penwood Street, Mt. Morris, Michigan, subject to a mortgage with a balance owing of $13,878.73.

In June 1960, petitioners Silverman and DeGillio represented to the Lavracks that they were desirous of purchasing their home for petitioner DeGillio's personal occupancy; and that the Lavracks would be free of all personal liability under the mortgage. In addition, petitioner DeGillio promised to pay the sum of $500 cash. Petitioner DeGillio, moreover, represented that he was earning One Hundred and Seventy-Six ($176) Dollars per week as a steward in the Teamsters' Union. On the basis of these representations petitioner DeGillio purchased the property, receiving a warranty deed from the Lavracks' real estate agent.

In January of 1961 the Lavracks signed a complaint charging petitioners Fred B. DeGillio and Milton Silverman with obtaining real estate of the value of $13,200.00, on alleged misrepresentations; a.) that the petitioner DeGillio was a stewart in the Teamsters' Union earning $176.00 per week; b.) that Silverman was purchasing the house for DeGillio's personal occupancy; c.) that the Lavracks would be free from any and all liability under the mortgage. A warrant was issued and petitioners taken into custody.

Then on January 18, 1961, petitioner DeGillio was interrogated by the Prosecuting Attorney and police in the office of the Prosecuting Attorney beginning at 5:10 p.m. and ending 5:20 p.m. During the course of the interrogation, the following colloquy took place:

A. You're arresting me; I can't stop you from arresting me.

Q. That is exactly right.

A. I can't argue the point. They picked me up off the street like a criminal.

Q. There is a question, isn't there, Mr. DeGillio, that you may be a criminal. We think you are; that is why we issued a warrant.

A. That is fine. Then I am entitled to go to court on this.

Q. That's right.

A. To find out if I am a criminal.

Q. We are entitled to investigate a case.

Also, on the same day petitioner Silverman was interrogated beginning at 6:10 pm and ending 6:15 pm (3a). During the course of the interrogation, the following colloquy took place:

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. Have you been arrested before?

A. I will answer no question when the machine is going.

Q. Are you on Federal probation now?

A. I will answer no question when the machine is going.

Q. Are you on Federal probation?

A. I live at 13241 Dartmouth, Oak Park, Michigan.

Mr. Leonard: O.K.

(To the reporter): That is all.

(Statement concluded at 6:15 pm).

Petitioners were then arraigned before an examining magistrate on the warrant and examination was set for January 26, 1961. At the request of Mr. Albert A. Goldfarb, petitioners' attorney, the examination was continued to February 15, 1961.

On February 14, 1961, at approximately 4:45 pm, petitioner Silverman appeared at the office of the Genesee County prosecutor, with a letter from Attorney Albert Goldfarb, seeking another continuance, because he was trying a case in Detroit and would not be available for examination on the following day. Petitioner Silverman was informed by the Prosecuting Attorney that 11 witnesses had been subpoened to testify at the examination, and that it would be impossible at that late hour to call the subpoenas off since some of the witnesses were coming from out of town. Petitioner Silverman was advised to appear the following day in Municipal Court with an attorney ready to proceed with the examination. On February 15, 1961, the examining magistrate formally denied the request for a continuance and proceeded with the preliminary examination (14a). At its conclusion, petitioners were bound over to circuit court for the county of Genesee for trial.

An information was filed charging petitioners with two counts, (1) of obtaining property by false pretenses and (2) conspiracy to cheat and defraud (15a - 16a).

"Motion to quash the Information was filed on behalf of the petitioners in which it was asserted that at said . . . preliminary examination the petitioners' constitutional rights were violated in that they were denied the right to be represented by counsel, in violation of Article VI of the United States Constitution. This motion was, on the 9th

day of March, 1961, denied by the trial judge (App 17a - 23a)." (Petitioners' brief p 4).

The statments of petitioners made during the preliminary interrogation were admitted into evidence as Exhibit 3 and 4 (24a - 25a). The record shows that they were not, however, used as a basis for argument to the jury. [B-2]

The Court directed a verdict of not guilty on the count of obtaining property under false pretenses. The jury, as directed, returned a verdict of not guilty on that count but returned a verdict of guilty on the conspiracy count (26a).

> "On Motion for a new trial, the petitioners . . . [contended] . . . that their Constitutional rights to counsel and of Due Process were denied them. On the 18th day of July, 1961, the Trial Judge overruled the Motion, sentenced the petitioner DeGillio to pay a fine of $7,500.00 within 48 hours, pay costs, within one week, of $900.00, spend 30 days in jail and 4 years probation; and on said day sentenced the petitioner Silverman to Jackson Prison for not less than 4-½ nor more than 5 years (Appendix 29a - 31a)." (petitioners' brief p 5).

> " . . . while the petitioner DeGillio was in the County Jail, the Trial Judge revoked petitioner DeGillio's probation on the ground that he had not paid within 48 hours the $7,500.00 fine, and within one week the $900.00 costs, and sentenced petitioner DeGillio to Jackson Prison for not less than 2-½ nor more than 5 years." (petitioners' brief p 5).

> "Petitioners sought Leave to Appeal to the Supreme Court of the State of Michigan. Their application

. . . was denied by the Supreme Court of the State of Michigan on the 8th day of August, 1961, without opinion (Appendix 31a - 32a) and on re-hearing the denial was affirmed on the 21st day of September, 1961, without opinion (Appendix 32a - 33a). From this denial petitioners seek review by this Court." (petitioners' brief p 6).

V

ARGUMENT

Question 1

DO PETITIONERS HAVE A CONSTITUTIONAL RIGHT TO COUNSEL DURING A PRELIMINARY INTERROGATION?

This Court has recognized the right of each State to adopt and follow its own criminal procedure but that procedure must conform to the due process requirement of the Fourteenth Amendment. *Buchalter* v. *New York*, 319 US 427. All that due process demands is that an accused be given a fair hearing. To facilitate due process the Michigan Constitution provides an accused with the right to counsel during trial;[1] however, as the court held in *People* v. *Padolski*, 322 Mich 508, certiorari denied 344 US 845, no such right is accorded during a preliminary examination. If counsel during a preliminary examination is not mandatory, then it follows that counsel during preliminary interrogation is not mandatory, since the preliminary interrogation precedes the preliminary examination.

In *Crooker* v. *California*, 357 US 433, this Court rejected

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[1] Art II, § 19, Michigan Constitution of 1908

defendants' contention that his constitutional right had been violated by the State's refusal to allow him to contact counsel during preliminary interrogation. This Court said:

> " . . . [petitioner] . . . would have every state denial of a request to contact counsel be an infringment of the constitutional right *without regard to the circumstances of the case*. In the absence of any confession, plea or waiver — or other event prejudicial to the accused — such a doctrine would create a complete anomally, since nothing would remain that could be corrected on new trial. Refusal by state authorities of the request to contact counsel necessarily would then be an absolute bar to conviction. On the other hand, where an event has occurred while the accused was without his counsel which fairly promises to adversely affect his chances, the doctrine suggested by petitioner would have a lesser but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning — *fair as well as unfair* — until the accused was afforded opportunity to call his attorney. Due process, a concept 'less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights,' *Betts* v. *Brady*, 316 U.S. 455, 462 (1942), demands no such rule."

Petitioners have failed to show how they were prejudiced by lack of counsel during the preliminary interrogation.

Question 2

WERE PETITIONERS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT BY THE TRIAL JUDGE'S REFUSAL TO GRANT A CONTINUANCE?

Petitioners contend they were not represented by counsel on the preliminary examination. In *People* v. *Podolski*, 332 Mich 508, 518, certiorari denied, 344 US 845, the court said " . . . representation on preliminary examination is permissible, not mandatory." The *Podolski Case* is cited with approval in *Armstrong* v. *Bannan, Warden*, 272 F2d 577, 581, wherein the court stated:

> "This . . . , does not show that he was prejudiced in any way by not being represented by counsel between the time of his arrest and his trial."

The *Armstrong Case, supra* is to be distinguished from the present case, in that, petitioners were represented by counsel but counsel failed to appear at the preliminary examination.

In *Issacs* v. *U.S.*, 159 US 487, 489, this court said:

> " . . . The action of the trial court upon an application for a continuance is purely a matter of discretion and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question."

Cited therein were the following cases:

Wood v. *Young*, 4 Cranch 237;

Barrow v. *Hill*, 13 How. 54;

Crampton v. *United States*, 138 US 361;

Cox v. *Hart*, 145 US 376;

Earnshaw v. *United States*, 146 US 60, 68;

Means v. *Bank of Randall*, 146 US 620.

Later in *Avery* v. *Alabama*, 308 US 444, 446, this court stated:

> "In the course of . . . [a preliminary examination] . . . many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed."

It is clear that the trial judge acted within his discretion in refusing to grant another continuance when he stated in his opinion; [23A]

> "Even if a right to be represented by counsel at preliminary examination did exist, it does not mean the judicial process stops because the counsel hired failed or refused to appear. Courts still set hearing and trial dates, not defense counsel. Furthermore, the right to counsel does not mean the right to any particular lawyer, especially where the lawyer is too busy to handle his clients' affairs or to appear in court at the date he was requested or agreed to."

Question 3

WERE PETITIONERS DENIED A FAIR TRIAL BY THE ADMISSION INTO EVIDENCE OF STATEMENTS MADE DURING A PRELIMINARY INTERROGATION?

In order to place themselves within the protection of due process, petitioners allege they were denied a fair trial. Yet, petitioners have neglected to furnish this court with any evidence to support this bare allegation. "It is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Buchalter* v. *New York*, supra, 431 Innuendo is not the "demonstrable reality" required by this Court.

The rule relating to admissibility of evidence in conspiracy cases is stated in *People* v. *Pickett*, 339 Mich 294, 312 certiorari denied, 349 US 937:

> "In conspiracy cases it is quite impossible to formulate a precise rule of evidence as to what testimony is and what is not admissible as being competent and relevant. Within reasonable bounds, the ruling of this character are within the discretion of the trial court and in the absence of a showing of prejudicial error such rulings do not afford a ground of reversal."

See also, *People* v. *Cooper*, 326 Mich 514, 524; *People* v. *Fleish*, 321 Mich 443, 459.

Acting within the judicial pronouncements of the Michigan Supreme Court, the trial judge admitted petitioners'

statements (3a) (4a) as evidence. He instructed the jury as to their voluntariness (24a).

Even if the statements were inadmissible "• • • it was error of the court," *Buchalter* v. *New York*, 319 US 427, 431, and not within the protection afforded by due process. "The due process clause of the Fourteenth Amendment; • • • does not permit (parties) to bring to the test of a decision in this court every ruling made in the course of a trial in a state court." *Buchalter* v. *New York*, supra, 429, 430.

Question 4

WERE PETITIONERS INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION?

Petitioners, in their application for leave to appeal to the Michigan Supreme Court, raised the point that count two of the information did not inform them of the nature and cause of the accusation. The Michigan Supreme Court denied their application. [31A].

In an early Michigan case, *People* v. *Butler*, 111 Mich 483, 484, the Michigan Supreme Court was confronted with some questions almost identical to those presented by petitioners herein:

> "It is the claim of the . . . [petitioners] . . . that this information should have been quashed, — First, because it states no offense known to the law; second, because it contains no allegations of the means by which . . . [petitioners] . . . conspired to cheat and defraud. The claim of the . . . [petitioners] . . . cannot be sustained."

Petitioners were charged with an offense well known to the law. Conspiracy to do an unlawful act was an indictable offense at the common law, *People* v. *Watson* 75 Mich 582, 586.

To purchase real property in accordance with the applicable law of the realm is a legal act. However, it is illegal to conspire, to cheat and defraud a property owner. See, *People* v. *Arnold*, 46 Michigan 268.

Petitioners, in an apparent attempt to confuse the court contend that to conspire to obtain real property by false pretenses is not in and of itself an unlawful object. Clearly, this is erroneous since the "conspiracy is the gist of the crime", *People* v. *Watson*, supra, 586.

In *People* v. *Arnold*, supra, the Michigan Supreme Court said:

> "It is conceded that if the act which the conspirators combine to perform is unlawful, it is not necessary to set out in the information the means intended to be employed in accomplishing it." (citations omitted).

The Court also stated:

> "To cheat and defraud by false pretenses a person named is an indictable offense by statute. In an information for this offense it would be necessary to specify the pretenses used; but in an information for conspiracy to cheat and defraud by false pretenses the like particularity is not essential. It is enough to allege in general terms the combination and agreement to commit the crime". (citation omitted).

The trial judge in his charge to the jury followed the above statements of the law. [B-1]

States are free to adopt and follow their own criminal procedure, *Buchalter* v. *New York* 319 US 427, 430. This Court has stated that it will not pass upon the sufficiency of an indictment when this question has been decided by a state supreme court, *Caldwell* v. *Texas*, 137 US 816. And, although, the question in that case involved an indictment, it is clear that no distinction between an indictment and information exists which would violate an accused's right to be informed of the crime with which he is charged.

VI

CONCLUSION

We therefore respectfully submit that since no federal question of substance is presented, the petition for certiorari should be denied.

Respectfully submitted,

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